Abdul Halim bin Abdul Hanan & Ors v Pengarah Penjara, Taiping & Ors

HIGH COURT (IPOH) — ORIGINATING SUMMONS NO 24–L088–91
KANG HWEE GEE J
27 OCTOBER 1995, 9 FEBRUARY 1996

Civil Procedure *— Originating summons — Irregularity — Supporting affidavit given by counsel — Whether supporting affidavit of counsel can validate summons — Whether counsel has knowledge to prove facts — Whether counsel in position to depose of facts — Rules of the High Court 1980 O 41 r 5(1)*

Legal Profession *— Professional discipline — Practice and etiquette rules — Counsel swear an affidavit on a substantive allegation for clients — Whether considered direct involvement in client's case — Whether counsel should appear and conduct case — Legal Profession (Practice and Etiquette) Rules 1978 r 28*

Civil Procedure *— Originating summons — When not maintanable — Dispute on facts — Whether action should have been begun by writ — Whether on dispute of facts the judge must ignore the disputed allegations*

By an originating summons, the joint plaintiffs sought a declaration that the orders made by the first defendant or his agent punishing the plaintiffs by confining them for about 23 hours a day was null and void and of no consequence in law and also for damages. At all material times, the plaintiffs were remand prisoners in the custody of the first defendant, who was under care and supervision of the Menteri Hal Ehwal Dalam Negeri ('second defendant') which is an agency of the Government of Malaysia ('third defendant'). As a result of a hunger strike, the plaintiffs claimed that they were punished by being locked up for 23 hours a day and denied their normal routine. The plaintiffs' summons was supported in the main by their counsel who affirmed their averments and not by their own affidavits. However, supplementary affidavits were later filed by the plaintiffs to confirm the counsel's affidavit. Therefore, there was a procedural issue on whether the summons was irregular by reason that it was not supported by the affidavit of the plaintiffs.

Held, dismissing the plaintiffs' application:

(1) Under O 41 r 5(1) of the Rules of the High Court 1980 ('the RHC'), a deponent of an affidavit to be used in support therein may only swear an affidavit of facts that he is able of his own knowledge to prove. As plaintiffs' counsel was not a prisoner of the Taiping Prison at the material time, he would not be able to depose of facts alleged to have occurred at the said prison. The fact that all the plaintiffs subsequently swore affidavits saying they confirmed the facts deposed to by their counsel without averring to the facts themselves would not validate the plaintiffs' case. As the plaintiffs' case rested solely on the affidavit of counsel, the summons was irregular and must fail (see p 60D–I;

Alliance (Malaya) Engineering Co Sdn Singapore v San Development Sdn Bhd [1972] 2 MLJ 100 followed).

(2) If a solicitor has a reason to believe that he could be a witness in a matter, he should not then appear in the matter under r 28 of the Legal Profession (Practice and Etiquette) Rules 1978. It would be unethical for counsel to swear an affidavit on a substantive allegation for his clients in a case and later plead his case in court. Hence, counsel for the plaintiffs should not have appeared in court to plead for the plaintiffs and should have left the conduct of the case to another counsel (see p 61A–D; *Million Group Credit Sdn Bhd v Lee Shoo Khoon & Ors* [1986] 1 MLJ 315 followed).

(3) Even if the supporting affidavit to the plaintiffs' summons was not irregular, the summons would still have to be dismissed as the opposing claims of the parties in their respective affidavits as to what actually happened had led to stalemate which could only be resolved if the deponents appear to be examined and cross-examined as in a writ action. Further, where there is a dispute on the facts alleged, the judge has to ignore the disputed allegations. Therefore, here this would leave the plaintiffs bereft of evidence required to prove their case (see pp 61E and 62A–B ; *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 436 followed).

Per curiam:

Having commenced this action by originating summons, it was still open to the plaintiffs to apply under O 28 r 8(1) of the RHC to convert the originating summons into a writ action or at the very least to apply under O 38 r 2(3) to cross-examine the deponents of the defendants' affidavit, although such emergency repairs are not usually condoned by the courts which may disallow any such application. Neither of these avenues, however, were resorted to by the plaintiffs (see p 61F–H; *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 436 followed).

[Bahasa Malaysia summary

Melalui saman pemula, plaintif-plaintif bersama meminta deklarasi bahawa arahan yang dibuat oleh defendan pertama atau ejennya dalam menghukum plaintif-plaintif dengan mengurung mereka selama 23 jam sehari adalah batal dan tak sah dan tidak berkesan mengikut undang-undang dan juga untuk ganti rugi. Pada masa yang berkenaan, plaintif-plaintif adalah banduan tahanan dalam jagaan defendan pertama, yang berada di bawah jagaan Menteri Hal Ehwal Dalam Negeri ('defendan kedua') yang merupakan ejen bagi Kerajaan Malaysia ('defendan ketiga'). Disebabkan mogok lapar, plaintif-plaintif mengatakan bahawa mereka telah dihukum dengan dipenjarakan selama 23 jam sehari dan tidak dibenarkan rutin harian. Saman plaintif-plaintif telah disokong sebahagian besarnya oleh peguam mereka yang telah mengesahkan penegasan mereka dan bukannya oleh afidavit mereka sendiri. Walau bagaimanapun, afidavit tambahan telah difailkan oleh plaintif-plaintif untuk mengesahkan afidavit

peguam itu. Maka, isu yang timbul adalah isu prosedur sama ada saman itu di luar aturan untuk sebab ianya tidak disokong oleh afidavit plaintif-plaintif.

Diputuskan, menolak permohonan plaintif-plaintif:

(1) Di bawah A 41 k 5(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT itu'), deponen sesuatu afidavit yang digunakan untuk menyokong hanya boleh mengangkat sumpah suatu afidavit tentang fakta yang boleh dibuktikannya sendiri dari pengetahuan dirinya. Oleh kerana peguam plaintif bukan seorang banduan di Penjara Taiping pada masa yang berkenaan itu, dia tidak dapat mendeposkan bahawa fakta-fakta yang didakwa telah berlaku dalam penjara itu. Fakta bahawa semua plaintif kemudiannya bersumpah dalam afidavit mengatakan bahawa mereka mengesahkan fakta yang didepos oleh peguam mereka tanpa menegaskan fakta-fakta itu sendiri tidak boleh mengesahkan kes plaintif-plaintif. Oleh kerana kes plaintif hanya berdasarkan afidavit peguam itu, saman itu adalah di luar aturan dan semestinya gagal (lihat ms 60D–I; *Alliance (Malaya) Engineering Co Sdn Singapore v San Development Sdn Bhd* [1972] 2 MLJ 100 diikut).

(2) Jikalau seseorang peguam percaya bahawa beliau mungkin menjadi seorang saksi di dalam sesuatu kes, adalah wajar jika dia tidak mengendalikan kes tersebut di mahkamah mengikut k 28 Kaedah-Kaedah Profesion Undang-Undang (Amalan dan Kesopanan) 1978. Ia adalah bertentangan dengan etika profesion jika peguam mengangkat sumpah sesuatu afidavit tentang dakwaan substantif untuk klien-kliennya dalam suatu kes dan kemudiannya mengendalikan kes itu di mahkamah. Oleh yang demikian, peguam bagi pihak plaintif tidak patut hadir di mahkamah untuk mengendalikan kes itu untuk plaintif-plaintif dan sepatutnya memberikan kes tersebut untuk tindakan selanjutnya kepada peguam yang lain (lihat ms 61A–D; *Million Group Credit Sdn Bhd v Lee Shoo Khoon & Ors* [1986] 1 MLJ 315 diikut).

(3) Biarpun afidavit yang menyokong saman plaintif-plaintif bukan di luar aturan, namun saman tersebut masih mesti ditolak kerana semua tuntutan pihak-pihak yang berkenaan dalam afidavit masing-masing tentang apa yang sebenarnya telah berlaku adalah berbeza dan ini membawa kepada kedudukan buntu yang hanya boleh diselesaikan jika deponen dapat hadir untuk diperiksa dan diperiksa balas seperti dalam tindakan writ. Lagipun, di mana terdapat perbalahan mengenai fakta yang dikatakan, hakim terpaksa tidak menghiraukan dakwaan yang dipertikaikan. Maka, di sini ini akan meninggalkan plaintif-plaintif tanpa keterangan yang diperlukan untuk membuktikan kes mereka (lihat ms 61E dan 62A–B; *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 436 diikut).

Per curiam:

A Setelah memulakan tindakan ini dengan saman pemula, ia masih terbuka kepada plaintif-plaintif untuk memohon di bawah A 28 k 8(1) KMT itu untuk menukar saman pemula itu kepada satu tindakan writ atau sekurang-kurangnya untuk memohon di bawah A 38 k 2(3) untuk memeriksa balas deponen-deponen afidavit defendan-defendan, B walaupun pembaikan cemas sedemikian tidak selalunya dibenarkan oleh mahkamah yang mungkin menolak permohonan sebegitu. Kedua-dua cara ini, walau bagaimanapun, tidak digunakan oleh plaintif-plaintif (lihat ms 61F–H; *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 436 diikut).]

C [*Editorial note*: The plaintiffs have appealed to the Court of Appeal vide Civil Appeal No A–01–122–95.]

Notes

For cases on originating summons, see 2 *Mallal's Digest* (4th Ed, D 1994 Reissue) paras 2334–2351.

For cases on professional discipline, see 9 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1527–1641.

Cases referred to

E *Alliance (Malaya) Engineering Co Sdn Singapore v San Development Sdn Bhd* [1972] 2 MLJ 100

Becker v Home Office [1972] 2 QB 407; [1972] 2 All ER 676; [1972] 2 WLR 1193

Karpal Singh & Ors v Penguasa Tempat Tahanan Perlindungan Taiping and another application [1989] 3 MLJ 47

F *Leech v Deputy Governor of Parkhurst Prison* [1988] 1 AC 533; [1988] 1 All ER 485; [1988] 2 WLR 290

Million Group Credit Sdn Bhd v Lee Shoo Khoon & Ors [1986] 1 MLJ 315

Monk v Warbey [1935] 1 KB 75

G *Pen Apparel Sdn Bhd v Leow Chooi Khon & Ors* [1995] 3 AMR 2290

Phillips v Britainnia Hygienic Laundry Co Ltd [1923] 1 KB 539

Shamsiah bte Ahmad Sham v Public Services Commision, Malaysia & Anor [1990] 3 MLJ 364

Tan Chye Choo & Ors v Chong Kew Moi [1966] 2 MLJ 4

Tay Bok Choon v Tahansan Sdn Bhd [1987] 1 MLJ 436

H

Legislation referred to

Dangerous Drugs Act 1952 s 39B
Internal Security Act 1960 s 57(1)(b)
Internal Security (Detained Persons) Rules 1960 r 73(h)
I Legal Profession (Practice and Etiquette) Rules 1978 r 28
Motor Vehicles (Construction and Use) Rules 1959 r 94
Prisons Ordinance 1952 s 55
Prison Rules 1953 r 188 (1), (2)
Rules of the High Court 1980 O 41 r 5(1), (2), O 28 r 8 (1), O 38 r 2(3), O 15 r 16
Sabah Prisons Ordinance 1956 s 78
Prison Rules 1964 r 42(3) [Eng]

Road Traffic Act 1930 s 35(1) [Eng] A

Gurbachan Singh (Bachan & Kartar) for the plaintiffs.
Ahmad Kamal (Senior Federal Counsel) for the defendants.

Kang Hwee Gee J: By this originating summons, the five joint plaintiffs are seeking: B

(a) a declaration that the orders made by the first defendant or his agent on or about 29 May 1991 punishing the plaintiffs by confining them for about 23 hours a day is null and void and of no consequence in law; and C

(b) damages.

The plaintiffs were at the material times remand prisoners in the custody of the Pengarah, Penjara Taiping ('first defendant'), who was under the care and supervision of the Menteri Hal Ehwal Dalam Negeri ('second defendant'), an agency of the Government of Malaysia ('third defendant'). D

The plaintiffs' summons was supported in the main not by their own affidavits as one would expect but by the affidavit of their counsel ('encl 1'), dated 17 September 1992, who claimed that the averments contained therein were within his personal knowledge which he had obtained from the plaintiffs themselves. In his affidavit, counsel claimed that he had to affirm the affidavit on behalf of his clients because they had been under the detention of the first defendant and because it was difficult to bring a commissioner of oath to the prison to attest their affidavits. E

Supplementary affidavits were later filed by the respective plaintiffs all dated 2 January 1992, purporting to confirm the averments of the affidavit of their counsel dated 30 November 1991 ('encls 2, 3, 4, 5 and 6'), which appear to be unrelated to the supporting affidavit of their counsel in encl 1 which was dated 17 September 1992. F

Basis of the plaintiffs' claim

Counsel's affidavit alleged that his clients were at the material times remand prisoners along with 50 or so others. A few days before 28 May 1991, some of the prisoners went on a hunger strike for two days to protest against the quality of food supplied by the first defendant. G

In consequence of the hunger strike, counsel claimed that the plaintiffs and the other prisoners were punished by being locked up for 23 hours a day. He alleged that they were denied their normal access to the bath and toilet. They had to ease themselves in their cells. They were also denied physical exercise and the use of the canteen. Their relatives were denied the usual weekly visits. It was contended that on 2 June 1991, tear gas was fired upon them but the affidavit did not disclose why, how and where this occurred. The affidavit also failed to disclose the precise dates and for how long the plaintiffs were subjected to this treatment. H I

In the hearing before me, counsel submitted that he was relying on s 78* of the Prisons Ordinance 1952 ('the Ordinance') which reads as follows:

[*See postcript to judgment, p 65.]

> Any prisoner who commits any minor prison offence or any aggravated prison offence may, if found guilty after due enquiry, be punished by the Commissioner or a senior prison officer by the infliction of such punishment as may be prescribed in the regulations.
>
> Provided that no such prisoner shall be so punished until he has had an opportunity of hearing the charge against him and making his defence.

As the plaintiffs had been denied a hearing before they were punished, counsel submitted that s 78 of the Ordinance had been infringed; the punishments meted out was, therefore, illegal and as they had brought mental and physical sufferings to the plaintiffs, they were entitled to be compensated in damages.

Defendants' version of what transpired

In his affidavit opposing the summons, the Pengarah, Penjara Taiping, En Kamaruddin bin Mohd Noor, the first defendant, denied that the plaintiffs and the other prisoners were subjected to the punishments as alleged.

According to En Kamaruddin, the plaintiffs were among 78 remand prisoners who had been charged under s 39B of the Dangerous Drugs Act 1952 and s 57(1)(b) of the Internal Security Act 1960. They were being detained at the first and third floor of block D of the Taiping Prison and as they were facing capital charges for which they could be sentenced to death, they had to be placed under special control and supervision.

On the 30 May 1991 at about 2.20pm, all the 78 prisoners had refused to eat their afternoon meal in protest against Order 5/90 of the director general of prison which prohibited all prisoners from smoking. The duty officer at the time was forced to take precautionary measures in the interest of security and safety by ordering the prisoners which included the plaintiffs back to their cells to be confined there. He denied they were ordered to be confined in the punishment cell as alleged.

As the officer responsible for the running of the prison, he had to change the daily schedule of the prisoners. Whereas previously, they had been allowed to mix around outside their cells and to bathe, to exercise and to wash their clothes freely, they were henceforth only allowed to leave their cell for 20 to 30 minutes twice a day — once in the morning and once in the afternoon and only in groups of five at a time. These measures he claimed were not punishments but were necessary under the circumstances in the interest of security and safety as all the prisoners were facing capital charges .

En Kamaruddin denied that the plaintiffs were subjected to hardship or abuse as alleged as the usual facilities such as the provision of meals, right to legal counsel and meeting with family and relatives, medical care, bathing and exercise twice a day continued to be provided. They were also allowed to buy their own food and drinks and their personal necessaries such as toothbrush, soap, slippers and shorts during prison visits.

Before me, senior federal counsel, En Ahmad Kamal for the defendants, argued that there was no question of any denial of the right of hearing under s 78 of the Ordinance as alleged as the plaintiffs were never subjected to any form of punishment. The first defendant, he submitted was empowed to act as he did under r 188 (1) and (2) of the Prison Rules 1953 which reads as follows: A

> (1) Any privilege allowed under this part may at any time be withdrawn by the officer-in-charge if satisfied that there had been an abuse thereof.
>
> (2) The officer-in charge may modify the routine of the prison in regard to an unconvicted prisoner so far as to dispense with any practice which in the opinion of the officer-in-charge is clearly unnecessary or unsuitable in the case of the particular prisoner. B

A procedural issue

First, I shall deal with the procedural issue raised in the affidavit in reply of the first defendant that is to say whether this summons is irregular by reason that it is supported not by the affidavit of the plaintiffs but by the affidavit of their counsel and consequently its effect on the plaintiffs' application. C

Unlike an action begun by writ which requires the physical presence of witnesses to give evidence, an action commenced by an originating summons relies on affidavits as evidence to support the plaintiffs' case. Strict rules of procedure are prescribed under the Rules of the High Court 1980 ('the RHC') with regard to the acceptance of affidavits filed in support of such summons which appear to have been framed with the purpose of preserving the rule against heresay much as when witnesses give oral testimony. Under O 41 r 5(1) of the RHC, 'an affidavit may contain only such facts as the deponent is able of his own knowledge to prove' except that under r 5(2) affidavits 'sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources or grounds thereof'. D E

An application is considered interlocutory if it does not decide the rights of the parties or is made only for the purpose of obtaining some direction of the court as to the conduct of the cause (see 15 *Halsbury's Laws of England* (3rd Ed) at para 854). An originating summons is clearly not an interlocutory proceeding and therefore a deponent of an affidavit to be used in support therein may only swear an affidavit of facts that he is of his own knowledge to prove (see *Alliance (Malaya) Engineering Co Sdn, Singapore v San Developement Sdn Bhd* [1972] 2 MLJ 100). It follows that unless counsel himself had been a prisoner of the Taiping Prison at the material time (which he was not), he would not be able to depose of facts alleged to have occurred at the said prison. The fact that all the plaintiffs subsequently swear affidavits saying they confirm the facts deposed to by their counsel without averring to the facts themselves would not validate the plaintiffs' case. F G H

As the plaintiffs' case rests solely on the affidavit of a person who was not in a position to depose of the facts therein from his own knowledge, the summons is irregular and must, therefore, fail. I

A question of ethics

But quite apart from the question of counsel's competency to swear the affidavit his direct involvement in his clients' case seems to have touched on the delicate question of professional ethics. Rule 28 of the Legal

Profession (Practice and Etiquette) Rules 1978 provides that a solicitor should not appear in a matter in which he has reason to believe that he will be a witness. It would, therefore, appear to be against ethics for counsel to swear an affidavit on a substantive allegation for his clients in this case and later appear to plead his case in this court (see *Million Group Credit Sdn Bhd v Lee Shoo Khoon & Ors* [1986] 1 MLJ 315).

I could find no merit in counsel's explanation that he had to swear the affidavit himself because of the difficulties he would encounter in communicating with the plaintiffs who were remand prisoners. It is common knowledge that prisoners are allowed reasonable access to counsel. There is no averment in his affidavit that the plaintiffs had been denied this access. On the contrary, the first defendant had averred in his affidavit that the plaintiffs were not denied this privilege. Counsel could have, had he so wished, visit his clients with a commissioner for oath to obtain their affidavits.

Having sworn the affidavit in support of his clients' summons, in order not to run foul of r 28, counsel should not have appeared in court and should have left the conduct of this case to another counsel.

There is an affidavit stalemate

But even assuming that the affidavit in support is not irregular and can be accepted for what it is worth, the plaintiffs' summons would still have to be dismissed as the opposing claim of the parties in their respective affidavits as to what actually transpired has led to a stalemate which could only be resolved if the deponents appear to be examined and cross-examined as in a writ action.

It should have been obvious to the plaintiffs that they should not have begun this action by originating summons but by writ as their claim was bound to be fairly contentious and a substantial dispute of fact could be expected. Having commenced this action by originating summons it was still open to the plaintiffs to apply under O 28 r 8(1) of the RHC to convert the originating summons into a writ action or at the very least to apply under O 38 r 2(3) to cross-examine the deponents of the defendants' affidavit, although such emergency repairs are not usually condoned by the courts which may disallow any such application. (See *Pen Apparel Sdn Bhd v Leow Chooi Khon & Ors* [1995] 3 AMR 2290.) Neither of these avenues, however, were resorted to by the plaintiffs. As it is, in assessing the plaintiffs' case, I would have to apply the restrictive mechanics of evaluation of affidavit evidence as set out in the Privy Council case of *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433, which reads as follows:

> If allegations are made in affidavits by the petitioner and those allegations are credibly denied by the respondent's affidavits, then in the absence of oral evidence or cross-examination, the judge must ignore the disputed allegations. The judge must then decide the fate of the petition by consideration of the undisputed facts.

In as much as the plaintiffs had alleged that they had been subjected to punishment without being given the opportunity of being heard, the defendants had averred that the prisoners had never been punished and were being locked up in the interest of safety and security following a protest against the director general's directive to ban smoking in prisons. What was alleged by the plaintiff had been credibly denied by the defendants. A finding of fact based on preponderance of probability could only be arrived at if the parties give oral evidence and be cross-examined on the nature, extent and purpose of the alleged detention. As it stands, following *Tay Bok Choon*, I have to ignore the disputed allegation thereby leaving the plaintiffs bereft of evidence required to prove their case.

*There is no cause of action**

Assuming that the supporting affidavit can be accepted and the allegations of mistreatment are true, I would still have to dismiss the plaintiffs' claim as I would have to find that they do not have a cause of action against the defendants under the Ordinance on account of a mere procedural breach of their right of being heard under s 78.

I will now elaborate.

From the summons and the supporting affidavits it is clear that the declaration and the damages sought for in the present summons is founded merely on the breach of statutory duty on the part of the 1st defendant for his failure to comply with s 78 of the Ordinance. It is not founded on any of the causes of action in tort such as an action for false imprisonment under the common law. It follows therefore, the plaintiffs' case would have to stand or fall on the finding whether they have a cause of action against the defendants under the said section.

Although s 78 prescribes a duty it does not make any provision for liability for its breach. A person injured by such a breach would therefore have to convince the court that he has a cause of action under that Ordinance. Whether or not an action for breach of statutory duty will lie against the defendants in the present summons would involve interpreting the intention of the legislature in relation to the objective of the Ordinance. If an action is to lie, the statute must be construed as being intended to protect the plaintiffs' interests by giving him a right of action in tort under the section for the defendants' breach of that duty.

No fixed principle of interpretation of duty in relation to cause of action seems to have been formulated by the courts, although general principles based on judicial discretions have evolved. I do not propose to set out these principles in detail as they could be gleaned from any reputable textbooks on tort such as SA de Smith, *Judicial Review of Administrative Action* (4th Ed) at p 530.

I do propose, however, to cite the following cases to illustrate the principles which I intend to apply in this case.

In *Monk v Warbey* [1935] 1 KB 75, the Court of Appeal in England held that a cause of action lay against the owner of a motor car who in breach of his statutory duty under s 35 (1) of the Road Traffic Act 1930, had permitted his car to be used by a person who was not insured against third party risks, was liable to the third party who was injured by the negligent driving of the uninsured person. The court took the view that the Act in question 'was passed for the purpose of giving remedy to third persons who might suffer injury by the negligence of the impecunious driver of the car', and although the Act itself prescribed a penalty against

[*See postcript to judgment, p 65.]

A the owner, 'there was nothing in the Act to show that a personal action is precluded by reason of the existence of a special remedy provided for a breach'.

On the other hand, in the earlier case of *Phillips v Britannia Hygienic Laundry Co Ltd* [1923] 1 KB 539, the same court held that a breach of a B statutory duty to keep a motor-car in a condition not to cause danger to any person on the car or on any highway was only a public duty and a person injured by the breach thereof has no remedy under the same statute, though he could well succeed at common law. The duty was held to be public because it was for the benefit of the public generally and the legislature could not have intended to create new duties toward individuals C who are already sufficiently protected by the common law remedies of negligence.

The principle in the *Phillips* case was approved by the former Federal Court in *Tan Chye Choo & Ors v Chong Kew Moi* [1966] 2 MLJ 4 which had to decide whether there was a cause of action on a breach of statutory D duty for the defendant's failure to properly maintain a motor vehicle in a safe condition in breach of r 94 of the Motor Vehicles (Construction and Use) Rules 1959 which reads as follows:

> The condition of any motor vehicle used on a road and all its parts and accessories, shall at all times be such that no danger is caused or likely to be E caused to any person on the vehicle or on the road.

The Federal Court confirmed the decision of the trial judge of the High Court that the duty imposed by r 94 was a public duty and not a duty enforceable by an individual. It could not, therefore, provide a cause of action under the rules to the plaintiffs who in that case suffered injuries as F a result of the failure of the braking and steering system of the vehicle.

In the present case, there could be little doubt that s 78 of the Ordinance is framed with the primary objective of enabling the prison commissioner and his senior officers to carry out their public duty to properly manage their prison. To this end, they are given the power to G control and regulate the conduct and behaviour of prisoners under their custody and under s 78 are provided with the power to punish prisoners who commit a prison offence subject to the statutory duty to give them a right of hearing before they are punished. That duty, however, is only a corollary of the power conferred upon them by the public in whose interest the prisoners are imprisoned. It is, therefore, not owed to the prisoners but H to the public. It follows, therefore, a breach of the duty to give the prisoners a hearing before subjecting them to punishment (if any) would not make the commissioner and his senior officers liable to the prisoners as that duty was not owed to them.

Further, to strengthen my view that the legislature could not have I intended to impose upon the the prison commissioner or his senior officers a new duty in s 78 of the Ordinance, I would adopt the same reasoning of Lord Atkins in *Phillip v Britainnia Hygienic Laundry Co Ltd* that the prisoners are already sufficiently protected by the common law. The plaintiffs could well have availed themselves of an action for false imprisonment for instance where there was unlawful infliction of bodily restrain; for assault where there was apprehension of force being used; and for battery where there was actual intentional application of force.

A There is also another reason against interpreting's 78 liberally in favour of the plaintiffs, that is to say, public policy based on the reasoning in *Becker v Home Office* [1972] 2 QB 407, a case which ruled, inter alia, on whether a prisoner had a cause of action against a prison governor in England for breach of his statutory duty.

B In that case, the plaintiff prisoner had claimed that the Holloway prison authorities had in breach of r 42 (3) of the Prison Rules 1964 wrongfully withheld a cheque sent to her by her solicitors thereby causing her undue anxiety as a result of which she suffered damages. The English Court of Appeal (Lord Denning MR, Edmund Davies and Stephenson LJJ) held that a breach of the Prison Rules 1964 even if proved does not per se, give rise to a cause of action. Per Lord Denning MR: C

> If the courts were to entertain actions by disgruntled prisoners, the governor's life would be made interlorable. The discipline of the prison would be undermined. The Prison Rules are regulatory directions only. Even if they are not observed, they do not give rise to a cause of action.

D Undoubtedly, a failure to observe a minor provision of a prison rule could not be equated with the breach of an important provision of the Ordinance affecting the civil right of a prisoner. A breach of s 78 may not therefore be readily interpreted as a mere regulatory breach but the policy consideration in the judgement that courts should not entertain actions by disgrunted prisoners could be aptly applied to the present case where the prisoner is E seeking damages under the Act. To interprete s 78 as allowing prisoners to claim damages merely because they are denied a hearing under the same section of the law framed for the very purpose of controlling their own behavior would not in my view be in the interest of good prison management. It could give rise to such anomalous situations where even the most guilty F of prisoners would be able to claim damages merely because they have been punished for for a prison offence without first been given the opportunity of being heard.

A denial of a prisoner's claim for damages under s 78 of the Ordinance does not necessarily mean that a prisoner would be left without any remedies in situations where his civil right has been infringed and he is G being unjustly punished. Where appropriate an order of certiorari could still lie to quash the decision of the prison authorities. Thus in *Karpal Singh & Ors v Penguasa Tempat Tahanan Perlindungan Taiping and another application* [1989] 3 MLJ 47, the High Court (Abdul Malek J) relying on the English case of *Leech v Deputy Governor of Parkhurst Prison* [1988] 1 H AC 533, found it necessary to entertain tine plaintiffs' application for an order of certiorari to quash the order of the prison superintendent's disciplinary award which subjected the plaintiffs to punishments without first affording them the opportunity of being heard in breach of r 73(h) of the Internal Security (Detained Persons) Rules 1960. It was held that 'an I essential characteristic right of a subject is a right of recourse to the courts whatever his status and however attenuated his rights and liabilities might be in consequence of some punitive or other process.'

The same case incidentally was also relied upon by counsel as authority that the plaintiffs have a cause of action against the defendants for failing to comply with the requirement of s 78 to hear the plaintiffs before

A subjecting them to punishment. With respect, I do not agree. This case merely decides that certiorari is always available to quash the decision of the prison authorities made arbitrarily to punish prisoners in breach of the rules of natural justice; it does not decide that they have a cause of action on the breach on which they could claim damages.

B *Basis on which a declaration may be granted*

An action for a declaration has now developed into one of the most creative procedural devices for ascertaining and determining the rights of parties or points of law particularly in the area of public law where the High Court often exercises its powers liberally under O 15 r 16 to make C binding declarations of right with consequential relief. (See the Supreme Court case of *Shamsiah bte Ahmad Sham v Public Services Commission, Malaysia & Anor* [1990] 3 MLJ 364, where the service of a public servant who was dismissed in breach of the rule of natural justice was restored in consequence of which she was able to claim arrears of salary due to her for D the period of the purported dismissal.)

In the present case, however, the purpose of seeking the declaration is not to correct an administrative impropriety in public law but to claim damages. It follows, therefore, unless the plaintiffs have a cause of action against the defendants, there could be no basis to grant the plaintiffs' application. E

The plaintiffs' summons is dismissed with cost.

**Postcript (9 February 1996)*

The publishers at the Malayan Law Journal brought to my notice today that s 78 referred to in the judgment does not exist in the Ordinance but F in the Sabah Prisons Ordinance 1956 ('the Sabah Prisons Ordinance') which only applies to Sabah. I am grateful to the Malayan Law Journal and regret the error.

I had relied solely on a photocopy of the law supplied by the plaintiffs' counsel who had erroneously submitted it as s 78 of the Ordinance. In the G event, the paragraph in my judgment 'There is no cause of action' would have to be ignored in so far as the basis of the decision is grounded on the law which did not apply here. As the plaintiffs' case was founded on the breach of a statutory duty which did not exist, it follows that their action would have to fail. In any case, the plaintiffs' application had failed on the H other two grounds, described under the headings 'A procedural issue' and 'There is an affidavit stalemate' in the judgment.

There is an equivalent provision in s 55 of the Ordinance which provides the prisons authorities the power to punish prisoners who commit a minor prison offence 'after due inquiry' but without providing specifically for the right to be heard as in the Sabah Prisons Ordinance. Had the I plaintiffs relied on these provisions, I would have applied the same reasonings to refuse the declaration sought.

Application dismissed.

Reported by Hanim Kamaruddin